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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TODD FLEMAL,

Petitioner/Appellant,

vs.

UTAH LABOR COMMISSION, CHAD
EWING, d.b.a. ITALIAN DRYWALL, and
UNINSURED EMPLOYERS FUND,

Respondents/Appellees.

Appeal No. 20110022-CA

BRIEF OF RESPONDENT CHAD EWING

PETITION FOR REVIEW FROM ORDER OF THE
UTAH LABOR COMMISSION

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STATEMENT OF JURISDICTION

This is an appeal from an Order of the Utah Labor Commission reversing an Administrative Law Judge's ("ALJ") award of workers' compensation benefits. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Labor Commission's factual finding that Todd Flemal was not the employee of Chad Ewing d.b.a. Italian Drywall is clearly erroneous.

Standard of Review: The Court of Appeals "will disturb the Commission's findings of fact only if they are clearly erroneous." *Mecham v. Labor Com'n*, 2010 UT App 283, ¶ 4, 241 P.3d 1217.

Preservation: This issue was preserved in Respondent Ewing's Memorandum in Support of Motion for Review, R. 84-137.

2. Whether Todd Flemal marshaled the evidence as required by Utah R. App. P. 24(a)(9).

Standard of Review: "[P]arties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 19, 164 P.3d 384. *See also* Utah R. App. P. 24(k).

Preservation: This issue deals with the sufficiency of Mr. Flemal's appeal and could not have been brought before the trial court.

STATUTES AND RULES

Utah Code Ann. § 34A-1-301

The commission has the duty and full power, jurisdiction, and authority to determine the facts and apply the law in this chapter or any other title or chapter it administers.

Utah Rules of Appellate Procedure, Rule 24(a)(9)

An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

Utah Rules of Appellate Procedure, Rule 24(k)

Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

STATEMENT OF THE CASE

Nature of the Case: Respondent Chad Ewing d.b.a. Italian Drywall ("Mr. Ewing") terminated the employment of Petitioner Todd Flemal ("Mr. Flemal"). After Mr. Flemal had been terminated, he fell off a crate and injured his hand. The Labor Commission found that "Mr. Flemal's employment had ended." R. 158. In coming to this determination of fact, the Labor Commission specifically accepted the testimony of Mr. Ewing and Mr. Bassett and rejected the testimony of Mr. Flemal. R. 157-158. Mr. Flemal now asks this Court to invade the authority given to the Labor Commission through Utah

Code Ann. § 34A-1-301 and substitute its determination of the credibility of witnesses for that of the Labor Commission's. The Labor Commission is in the best position to judge the credibility of witnesses. The Labor Commission's finding of fact based on the credibility of the witnesses cannot be overturned by this Court unless the finding is clearly erroneous. The Labor Commission's finding of fact is supported by substantial evidence and the Order of the Labor Commission denying Mr. Flemal's claim to benefits must be upheld.

Statement of Facts: Mr. Flemal claims he is entitled to workers' compensation benefits based on an injury that occurred on April 16, 2007. R. 157. Mr. Ewing terminated Mr. Flemal for drug use prior to the accident. The Labor Commission ultimately found that Mr. Flemal was terminated prior to his accident and was not entitled to workers' compensation benefits. R. 158. This appeal followed.

SUMMARY OF ARGUMENTS

Mr. Flemal is challenging a factual finding of the Labor Commission, namely that his employment was terminated prior to the accident. This Court can only overturn the Labor Commission's findings of fact if they are clearly erroneous. The Labor Commission's finding is based on the testimony of Mr. Ewing and Mr. Bassett. The Labor Commission's finding is not clearly erroneous and must be affirmed.

The Labor Commission's finding is based on the credibility of the witnesses. This Court is not in a position to weigh the credibility of the witnesses. The Labor Commission has been delegated the duty and full power, jurisdiction, and authority to determine the

facts in workers' compensation cases. Its determination of the credibility of witnesses and the facts of this case are entitled to great deference by this Court and the Order of the Labor Commission should be upheld.

As Mr. Flemal is challenging the factual finding that he was terminated from his employment, he has the duty to marshal the evidence in support of this finding. He has failed to do so. This Court should exercise its discretion and refuse to hear Mr. Flemal's arguments as he failed to meet his duty to marshal the evidence.

ARGUMENT

I. The Labor Commission's Finding that Mr. Flemal's Employment had been Terminated is not Clearly Erroneous.

Mr. Flemal's brief on appeal clearly indicates that he is challenging a factual finding of the Labor Commission. He states that the "sole factual issue to be determined and upon which his right, if any, to compensation is based, is whether Mr. Flemal was an employee of Respondent Chad Ewing, dba Italian Drywall at the time of his injury." Brief of Petitioner, p. 5. Mr. Flemal also states that the "sole disputed issue is his employment status." *Id.* at 17.

The Labor Commission is in the best position to determine this factual issue and decided it against Mr. Flemal. Indeed, the Utah Legislature has given the Labor Commission the "duty and full power, jurisdiction, and authority to determine the facts" in workers' compensation cases. Utah Code Ann. § 34A-1-301. The Labor Commission's Order states:

The fact remains that Mr. Flemal's employment had ended. His subsequent actions, which resulted in his accident and injury, were not within the period of his employment and, consequently, were not in the course of his employment. Consequently, his injuries are not compensable under § 34A-2-401(1) of the Utah Workers' Compensation Act.

R. 158. The Labor Commission resolved the factual dispute against Mr. Flemal. Mr. Flemal's employment had been terminated and he is not entitled to workers' compensation benefits.

This Court "will disturb the Commission's findings of fact only if they are clearly erroneous." *Mecham v. Labor Com'n*, 2010 UT App 283, ¶ 4, 241 P.3d 1217 (citing *Salt Lake City Corp. v. Labor Com'n*, 2007 UT 4, ¶ 13, 153 P.3d 179). The Labor Commission's finding that Mr. Flemal's employment had been terminated prior to the accident is not clearly erroneous. It is supported by the testimony of Mr. Ewing and Mr. Bassett. Both testified that Mr. Flemal had been terminated prior to his accident. As this factual finding is not clearly erroneous, it cannot be disturbed. The Labor Commission's factual finding is not clearly erroneous and the Order denying Mr. Flemal's workers' compensation benefits must be upheld.

II. The Labor Commission is in the Best Position to Determine the Credibility of Witnesses

Mr. Flemal also challenges the weight the Labor Commission gave to each witnesses' testimony. In his brief, Mr. Flemal claims that the Labor Commission's Order should be reversed because Mr. Ewing's testimony is not credible. *See* Brief of Petitioner, pp. 9, 10, 11, and 13. However, it is not for this Court to determine whether Mr. Ewing's

testimony was credible or not.

The Labor Commission is in the best position to determine the credibility of witnesses and how much weight should be given to each witnesses' testimony. "It is not the role of [the Court of Appeals] to reweigh the evidence and substitute [its] conclusion for that of the Commission. Instead, [it] defers to the Commission's findings because, when reasonably conflicting views arise, it is the Commission's province to draw inferences and resolve these conflicts." *Speirs v. Southern Utah University*, 2002 UT App 389, ¶ 13, 60 P.3d 42 (internal citations omitted).

The Labor Commission specifically found that the testimony of Mr. Ewing and Mr. Flemal were not credible. R. 157-158. The Labor Commission found that Mr. Bassett's testimony was credible and supported Mr. Ewing's testimony. R. 158. The Labor Commission adopted the testimony of Mr. Bassett and Mr. Ewing that Mr. Flemal had been terminated prior to his accident. *Id.* The Labor Commission rejected Mr. Flemal's version of the events. Mr. Flemal now asks this Court to reweigh the evidence and substitute its findings for that of the Labor Commission. This is not the role of the Court of Appeals. "[I]t is firmly established that the Commission has the exclusive prerogative of judging the credibility of the witnesses, appraising the evidence and finding the facts, which must not be disturbed if there is a reasonable basis therein to support them" *Mollerup Van Lines v. Adams*, 398 P.2d 882, 885 (Utah 1965). The Labor Commission has the power and authority to resolve the conflict in the testimony

and it did so. There is substantial evidence that supports the Labor Commission's finding. The finding does not exceed the bounds of rationality. Therefore, the Labor Commission's order must be upheld.

III. Mr. Flemal Failed to Marshal the Evidence

Mr. Flemal is challenging the Labor Commission's factual finding that he was not an employee at the time of the accident. "A party challenging a fact finding must first marshal all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9). Mr. Flemal failed in his duty to marshal the evidence so the Labor Commission's Order should be sustained.

There is one main issue on this appeal: Whether the Labor Commission's factual finding that Todd Flemal was not the employee of Chad Ewing d.b.a. Italian Drywall is clearly erroneous. Mr. Flemal failed to marshal the evidence to show he is entitled to relief on this issue. As such, this Court should exercise its discretion and decline to consider Mr. Flemal's arguments.

"To successfully challenge an agency's factual findings, the party must [marshal] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Delaney v. Labor Com'n*, 2008 UT App 141, 2008 WL 1748304 (internal citations omitted). Instead of marshaling the evidence in support of the Labor Commission's finding, Mr. Flemal boldly declares "There is simply no evidence to support [Mr. Ewing's] claim of firing Petitioner prior to the workplace injury." Brief of

Petitioner, p. 13. This statement does not meet the duty to marshal the evidence. Thus, this Court should decline to address Mr. Flemal's arguments pursuant to Utah R. App. P. 24(k).

There is substantial evidence that supports the Labor Commission's findings. Mr. Ewing's testimony was corroborated by Mr. Bassett's testimony. The Labor Commission found Mr. Bassett's testimony to be credible. Mr. Flemal failed in his duty to marshal the evidence and his appeal should be dismissed.

IV. Mr. Ewing Joins in the UEF's Brief

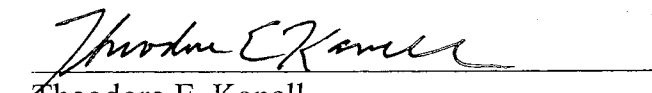
The Uninsured Employers Fund ("UEF") will also be filing a brief in this action. Mr. Ewing hereby joins in the arguments asserted by the UEF.

CONCLUSION

Mr. Ewing terminated Mr. Flemal prior to his injury. Thus, Mr. Flemal's injury could not have occurred within the course and scope of his employment. The Court of Appeals must sustain the Labor Commission's findings of fact unless they are clearly erroneous. The Labor Commission's finding the Mr. Flemal had been terminated is supported by substantial evidence and must be affirmed.

DATED this 13 day of September, 2011.

PLANT, CHRISTENSEN & KANELL


Theodore E. Kanell
Attorney for Chad Ewing

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of September, 2011, a true and correct copy of **BRIEF OF RESPONDENT CHAD EWING** was mailed, postage prepaid to the following:

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